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Supreme Court of the United States

October Term, 1995

GEORGE HERBST NORTHRUP AND FAYE RUTH MARGOLIS, PARENTS AND NEXT FRIENDS OF DANIEL CHARLES NORTHRUP,

Petitioners,

-vs.-

DONNA E. SHALALA, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED

1. What Standard of Review (*e.g.*, "clearly erroneous" or "arbitrary and capricious") should be applied in appeals to the Federal Circuit Court of Appeals under the Vaccine Act, 42 U.S.C. § 300aa-10 *et seq*?

2. Will Due Process countenance the failure of the Court of Appeals to provide meaningful review, when, under the "inquisitorial" format of vaccine injury adjudication in the Office of Special Masters of the United States Court of Federal Claims, a special master has adjudicated disputed issues of fact without affording the opportunity to be heard or present evidence?

3. Can a doctrine which creates a presumption against the credibility of parent-petitioners in vaccine compensation law be based upon the narrow holding of this court in the case of *United States v. United States Gypsum,* 333 U.S. 364 (1947)?

LIST OF PARTIES

All parties to this and related litigation are listed in the caption hereof.

TABLE OF CITATIONS

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page

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Bowles v. Carnegie-Illinois Steel Corporation, 149 F.2d 545 (7th Cir. 1945) 29

Bradley v. Secretary of DHHS, 991 F.2d 1570 (Fed. Cir.) 19, 20

Bunting v. Secretary of DHHS, 931 F.2d 867 (Fed. Cir. 1991) 17, 25

Copeland v. Secretary of DHHS, No. 90-867V (Cl. Ct. Spec. Mstr. January 7, 8 1993, errata January 5, 1993) 9

Costa v. Secretary of DHHS, 26 Cl. Ct. 866 (1992) 10

Costa v. Secretary of DHHS, Case No. 90-1476V (Cl Ct. Spc. Mstr. February 26, 1992) . . 10

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Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) 25

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page

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Hines v. Secretary of DHHS, 940 F.2d 1518 (Fed. Cir. 1991) 17

Jay v. Secretary of DHHS, 998 F.2d 979 (Fed. Cir. 1993) 19

McClendon v. Secretary of DHHS, 24 Cl. Ct. 329 (1991) 25

Montgomery Coca-Cola Bottling Co. v. United States, 615 F.2d 1318, 1328 (Ct. Cl. 1980) 10, 26

Munn v. Secretary of DHHS, 970 F.2d 863 (Fed. Cir. 1992) 19

O'Connell, et al. v. Shalala, Case No. 95-1355, Court of Appeals for the First Circuit 7

Phillips v. Secretary of DHHS, 988 F.2d 111 (Fed. Cir. 1993) 19

Schafer v. American Cyanamid Co., 20 F.3d 1 (1st Cir. 1994) 24

Shalala v. Whitecotton, 115 S.Ct. 1477 (1995) 24

Suel v. Secretary of DHHS, 31 Fed. Cl. 1 (1993) 9

United States v. International Business Machines, 66 F.R.D. 154 (S.D.N.Y. 1974) . 27

United States v. United States Gypsum, 333 U.S. 364 (1968) . . . 10, 16, 21, 23, 26, 27

Statutes Cited:

page

28 U.S.C. § 1254 (1) 2

42 U.S.C. § 300aa-11 (a) (1) 8

42 U.S.C. § 300aa-11 (c) (1) (C) (ii) . . . 8

42 U.S.C. § 300aa-12 . . . . . 9, 17,

42 U.S.C. § 300aa-12 (a) 23, 24

42 U.S.C. § 300aa-12 (a) through (d) . . 17

42 U.S.C. § 300aa-12 (d) (3) 9

42 U.S.C. § 300aa-12 (e) 23, 24

42 U.S.C. § 300aa-12 (f) 23, 24

42 U.S.C. § 300aa 13 (b) (2) 28

42 U.S.C. § 300aa-13. 26

42 U.S.C. § 300aa-14 (a) I. D. 9

42 U.S.C. § 300aa-14 (b) (2) 9

42 U.S.C. §§ 300aa-10 *et seq*. 2

42 U.S.C. §§ 300aa-10 to 300aa-34 8

Pub. L. No. 100-203, Title IV, Subtitle D, § 4307, 100 Stat. 1330-224 17

Pub. L. No. 101-239, Title VI, Subtitle D, § 6601, 103 Stat. 2286-90 17

Pub. L. No. 99-660, Tit. III, 100 Stat. 3755 8

Other Authorities Cited:

page

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5 C.J.S. 114-118, *Appeal and Error* § 704 29

Carrington, *The Power of District Judges and the Responsibility of the Courts of Appeals*, 3 Georgia L. Rev. 507 (1969) 22

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F.R.E. 701 25

Fed. Cir. R. 36 20

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Qualifications of Examiners of Questioned Documents, 16 Am. Jur. Proof of Facts 481 (1965) 19

Rule 52, F.R.C.P. 17, 23

Supreme Court Rule 10.1 (a) 14

APPENDICES

page

A. Judgement, United States Court of Appeals for the Federal Circuit, September 19, 19951a

B. Order of Dismissal, United States Court of Federal Claims, July 29, 1994 . . . . 2a

C. Order, United States Court of Federal Claims, July 22, 1994 . . . . . 3a

D. Decision on Remand, Office of the Special Masters, United States Court of Federal Claims, July 19, 1994 . . . . . 5a

E. Order, Office of the Special Masters, United States Court of Federal Claims, June 30, 1994 . . . . . 12a

F. Decision, Office of the Special Masters, United States Court of Federal Claims, February 3, 1994 . . . . . 17a

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GEORGE HERBST NORTHRUP AND FAYE RUTH MARGOLIS, PARENTS AND NEXT FRIENDS OF DANIEL CHARLES NORTHRUP,

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---

PETITION FOR WRIT OF CERTIORARI

The petitioners, George Herbst Northrup and Faye Ruth Margolis, parents and next friends of Daniel Charles Northrupp, respectfully pray that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Federal Circuit, entered in the above entitled proceeding on September 19, 1995, said review to include the underlying orders of the united States Court of Federal Claims and its Office

of the Special Masters.

OPINIONS BELOW

The affirmance without opinion and judgement of the Court of Appeals of the Federal Circuit (App., *infra* 1a) is an Unpublished Disposition, dated the 19th day of September, 1995. The opinion of the United States Court of Federal Claims (App., *infra*, 3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1995. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-10 *et seq.*, provides in pertinent part:

§ 300aa-11. Petitions for Compensation

(a) **General rule.** (1) A proceeding for compensation under the Program for a vaccine-related injury or death shall be initiated by service upon the Secretary and the filing of a petition containing the matter prescribed by subsection (c) with the United States Claims Court. The clerk of the United States Claims Court shall immediately forward the filed petition to the chief special master for assignment to a special master under section 2112(d)(1)[42 USCS § 300aa-12(d)(1)].

* * *

(c) **Petition content.** A petition for compensation under the Program for a vaccine-related injury or death shall contain--

(1) except as provided in paragraph (3), an affidavit, and supporting documentation, demonstrating that the person who suffered such injury or who died--

(A) received a vaccine set forth in the Vaccine injury Table or, if such person did not receive such a vaccine, contracted polio, directly or indirectly, from another person who received an oral polio vaccine,

* * *

(C) (i) sustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table in association with the vaccine referred to in subparagraph (A) or died from the administration of such vaccine, and the first symptom or manifestation of the onset or of the significant aggravation of any such illness, disability, injury, or condition or the death occurred within the time period after vaccine administration set forth in the Vaccine Injury Table . . .

§ 300aa-12. Court Jurisdiction

(a) General rule. The United States Claims Court and the United States Claims Court special masters shall, in accordance with this section, have jurisdiction over proceedings to determine if a petitioner under section 2111 [42 USCS § 300aa-11] is entitled to compensation under the Program and the amount of such compensation. The United States Claims Court may issue and enforce such orders as the court deems necessary to assure the prompt payment of any compensation awarded.

* * *

(c) **United States Claims Court special masters.** (1) There is established within the United States Claims Court an office of special masters which shall consist of not more than 8 special masters. The judges of the United States Claims Court shall appoint the special masters, 1 of whom, by designation of the judges of the United States Claims Court, shall serve as chief special master. The appointment and reappointment of the special masters shall be by the concurrence of a majority of the judges of the court.

* * *

(3)(A) A special Master to whom a petition has been assigned shall issue a decision on such petition with respect to whether compensation is to be provided under the Program and the amount of such compensation. The decision of the special master shall--

(i) include findings of fact and conclusions of law, and

(ii) be issued as expeditiously as practicable but not later than 240 days, exclusive of suspended time under subparagraph (C), after the date the petition was filed.

The decision of the special master may be reviewed by the United States Claims Court in accordance with subsection (e).

* * *

(e) Action by the United States Claims Court. (1) Upon issuance of the special master's decision, the parties shall have 30 days to file with the clerk of the United States Claims Court a motion to have the court review

the decision. If such a motion is filed, the other party shall file a response with the clerk of the United States Claims Court no later than 30 days after the filing of such a motion.

(A) uphold the findings of fact and conclusions of law of the special master and sustain the special master's decision.

(B) set aside any findings of fact or conclusion of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law, or,

(C) remand the petition to the special master for further action in accordance with the court's direction.

(f) Appeals. The findings of fact and conclusions of law of the United States Claims Court on a petition shall be final determinations of the matters involved, except that the Secretary or any petitioner aggrieved by the findings or conclusions of the court may obtain review of the judgment of the court in the United States court of Appeals for the Federal Circuit upon petition filed within 60 days of the date of the judgment with such court of appeals, within 60 days of the date of entry of the United States Claims Court's Judgment with such court of appeals.

§ 300aa-13. Determination of eligibility and compensation

(a) General rule. (1) Compensation shall be awarded under the Program to a petitioner if the special master or court finds or the record as a whole--

(A) that the petitioner has demonstrated by a preponderance of the evidence the

matters required in the petition by section 2111(c)(1)[42 USCS § 300aa-11(c)(1)], and

(B) that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition.

(b) Matters to be considered. (1) In determining whether to award compensation to a petitioner under the Program, the special master or court shall consider, in addition to all other relevant medical and scientific evidence contained in the record--

(A) any diagnosis, conclusion, medical judgment, or autopsy or coroner's report which is contained in the record regarding the nature, causation, and aggravation of the petitioner's illness, disability, injury, condition, or death, and

(B) the results of any diagnostic or evaluative test which are contained in the record and the summaries and conclusions.

Any such diagnosis, conclusion, judgment, test result, report, or summary shall not be binding on the court. In evaluating the weight to be afforded to any such diagnosis, conclusion, judgment, test result, report, or summary, the special master or court shall consider the entire record and the course of the injury, disability, illness, or condition until the date of the judgment of the special master or court.

(2) The special master or court may find the first symptom or manifestation of onset or significant aggravation of an injury, disability, illness, condition or death described in a petition occurred within the

time period described in the Vaccine Injury Table even though the occurrence of such symptom or manifestation was not recorded or was incorrectly recorded as having occurred outside such period. Such a finding may only be made upon demonstration by a preponderance of the evidence that the onset or significant aggravation did in fact occur within the time period described in the Vaccine Injury Table."

(c) "Record" defined. For purposes of this section, the term "record" means the record established by the special masters of the United States Claims Court in a proceeding on a petition filed under section 2111[42 USCS § 300aa-11].

§ 300aa-14. Vaccine Injury Table

(a) Initial table. The following is a table of vaccines, the injuries, disabilities, illnesses, conditions, and deaths resulting from the administration of such vaccines, and the time period in which the first symptom or manifestation of onset or the significant aggravation of such injuries, disabilities, illnesses, condition, and deaths is to occur after vaccine administration for purposes of receiving compensation under the Program:

VACCINE INJURY TABLE

I. DTP; P; DTP/Polio Combination; or Any Other Vaccine Containing Whole Cell Pertussis Bacteria, Extracted or Partial Cell Bacteria, or Specific Pertussis Antigen(s).

Illness, disability, injury, or condition covered:

Time period for first symptom or manifestation of onset or of

significant aggravation after vaccine administration:

* * *

D. Residual seizure disorder in accordance with subsection (b)(2): 3 days

STATEMENT

1. The National Childhood Vaccine Injury Act (Vaccine Act) was established in 1986, to establish the National Vaccine Injury Compensation Program. Pub. L. No. 99-660, Tit. III, 100 Stat. 3755, codified as amended at 42 U.S.C. §§ 300aa-10 to 300aa-34. The Program is administered by the Secretary of Health and Human Services, and provides that compensation may be paid "for a vaccine-related injury or death."

A proceeding for compensation is initiated by the filing of a petition in the United States Court of Federal Claims. 42 U.S.C. § 300aa-11 (a) (1). The Claimant may establish entitlement to compensation by proving that he suffered an injury caused by the administration of a covered vaccine. *See* 42 U.S.C. § 300aa-11 (c) (1) (C) (ii). The second and more common route, pursued by the petitioners, allows the petitioner to rely on the Vaccine Injury Table (Table), which establishes a rebuttable presumption of causation in certain circumstances.

The Vaccine Injury Table identifes vaccines which are covered by the Act, including DPT (Diphtheria, Pertussis,

Tetanus). The Table specifies injuries[1] which qualify for the presumption, including "residual seizure disorder" under 42 U.S.C. § 300aa-14 (b) (2).

The Table sets forth time periods "for first symptom or manifestation of onset or of significant aggravation after vaccine administration." For a residual seizure disorder related to DPT vaccine, the period is three days. 42 U.S.C. § 300aa-14 (a) I. D.

Cases under the Vaccine Act are adjudicated in the first instance by a special master, in the Office of Special Masters that was created especially for Vaccine Act cases. 42 U.S.C. § 300aa-12 (d) (3). The Office of Special Masters and the Court of Federal Claims have co-extensive jurisdiction over petitions, and the Court itself has a limited and narrow "review" function, under an "arbitrary and capricious, abuse of discretion, or not in accordance with law" standard. *See* 42 U.S.C. § 300aa-12. The Act creates a right of appeal to the Court of Appeals for the Federal Circuit.

2. The case of Daniel Northrup is a case which turned on the singular factual question of whether seizure onset occurred within 72 hours of a DPT shot. Daniel has Tuberous Sclerosis Complex (TSC), the condition which is explored in the decisions of the special masters and the Court of Federal Claims in *Suel v. Secretary of DHHS*, 31 Fed. Cl. 1 (1993), *Copeland v. Secretary of*

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[1]The Table as originally enacted is in issue in this and literally hundreds of pending cases. Administrative revisions, effective as of March 10, 1995, are currently under challenge in the Circuit Court of Appeals in and for the First Circuit. *O'Connell, et al. v. Shalala*, Case No. 95-1355.

DHHS, No. 90-867V (Cl. Ct. Spec. Mstr. January 7, 8 1993, errata January 5, 1993)[2].

Seizures are the *sine qua non* of mental retardation in TSC, and the earlier they occur, the worse the prognosis. As well-explicated in *Costa I*, children with TSC should not receive DPT vaccine.

The factual issue, therefore, was simple; it was whether the onset of the infantile spasms suffered by Daniel Northrup were first manifested within three days--"Table time"--of the third DPT shot which Daniel received on September 9, 1988.

3. In keeping with the statutory hope of expedited and informal proceedings, the major "omnibus proceeding" for determination of the medical and scientific issues in TSC was held on the 21st of October, 1991, at the Mayo Clinic. Decision at page 2, App. *infra* at 18a. The hearing to determine whether or not the onset of seizures was in table time was held in Washington D.C. on the 20th of April, 1993. On the 3rd day of February, 1994, Special Master Millman issued her first Decision, denying compensation. App., *infra*, 17a. The basis of the Decision was a "credibility" decision, with a legal twist: Special Master Millman--with reference to "well established caselaw[3]"--stated that

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[2]*See also Costa v. Secretary of DHHS*, Case No. 90-1476V (Cl Ct. Spc. Mstr. February 26, 1992). This seminal Decision by Special Master Millman (referred to hereinafter as *Costa I*) was reversed in part by the Claims Court (before that court was renamed the Court of Federal Claims). *Costa v. Secretary of DHHS*, 26 Cl. Ct. 866 (1992). But it contains, along with *Copeland*, extensive discussion of the nature of TSC and the impact of Vaccine-induced seizures upon the condition. The reversal and remand of *Costa* did not significantly affect the factual discussion, and the petitioners prevailed on remand.

[3]The special master relied on *United States v. United States Gypsum*, 333 U.S. 364, 396 (1968) and its Court of Claims progeny, *Montgomery Coca-Cola Bottling Co. v. United States*, 615 F.2d 1318, 1328 (Ct. Cl. 1980).

information gleaned from contemporary medical records is "more believable" than trial testimony. Decision at page 13, App., *infra* at 25a.

The decision was based, ultimately, upon the medical records. A contemporaneous document was in evidence, which recorded the existence of infantile spasms within three days of the shot. The document was a full page of handwritten notes, which the mother testified that she had prepared as a checklist before calling the doctors to voice her concerns. But this contemporaneous document was not mentioned at all in the decision, even though it is more specific than the medical records, and would constitute absolute proof of Table time onset.

Certain medical records spoke not of onset, but to how long the condition had been present. The special master derived the onset date from these records, and found that the seizures started ten days after the shot. Decision at page 14, App., *infra* at 26a.

4. A review proceeding followed, on motion and memorandum of objections to the Court of Federal Claims. The objections were that the special master's failure to discuss the mother's notebook, the critical contemporaneous document, made review of the decision impossible, and that the special master's failure to consider the corroborative effect of the mother's contemporaneous notes and was arbitrary and capricious. It was asserted that the special master had erred in rejecting the mother's testimony.

The notebook in question had been admitted as an exhibit in photocopy form at the trial. The Respondent's counsel had requested that the original be filed, if it could be found. But the parents were unable

to find the original[4] (packed away for a move from one residence to another) in time for the Decision. The Decision had finally issued without regard to the availability of the original.

On the 19th day of April, 1993, Judge Tidwell remanded the case "with directions to consider the new evidence *and conduct further proceedings as proper*." Order, April 19, 1994. App., *infra*, at .

5. The special master held another hearing, this time by telephone, on the 29th of June, 1994. The notebook was considered as evidence, but photographs, corroborative of the mother's testimony as to the appearance of the seizure activity were not. At this final hearing, Dr. Margolis, Daniel's mother, testified regarding the other notations in the notebook. It was shown that these notations, in the context of the case and time-frame, authenticate the notebook as a document contemporaneous to the time of the shot in question.

Finally, at the end of the hearing on remand, the special master was still not satisfied that the notebook was what it purports to be--that is, contemporaneous proof of table-time onset of infantile spasms. It was determined that the notebook would be sent to the Secret Service, because the Special Master stated:

> "* * * *it seems that the pertinent notation* on page 5, 'Arm Openings" [sic], 'arched back', *is a later insertion*. These words were *written*

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[4]The original of the notebook was found just prior to the filing of the appeal, and presented to the Court of Federal Claims along with the motion for review. Counsel for the parties had agreed that the motion should be filed in lieu of attempting to reopen the Decision, for fear of violating strict jurisdictional rules.

> *in a fainter ink* than the rest of the page, except for one word 'Zerox [sic]' on the top left, which Dr. Margolis admitted she wrote when she was gathering documents for her attorney in preparation for the litigation. "

The special master went on:

> "*The court is loathe to accuse petitioners* of submitting a document containing fraudulent information, i.e., a later inserted entry of arm openings and arched back in order to buttress their case, *but* it is *also loathe to accept what on its face seems suspiciously altered.*"

Therefore the court ordered respondent to obtain expert ink analysis of page 5 to determine *based on scientific evidence* if the words "Arm openings, arched back" were inserted at a different time than the rest of the page's handwriting and, in fact, at the same time as the notation 'Zerox.'" Report to Judge, July 14, 1994, page 3, App., *infra* at (emphasis added). Thereafter, the Secret Service produced a report which stated that the ink from the **entire** 1988 notebook was black Bic ballpoint pen ink, as was the "Zerox" notation. Another notation, made in 1990[5] by Dr. Northrupp, Daniel's father, was in different ink.

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[5]The "Zerox" notation was made because in 1990 the parents had been instructed by counsel to marshall evidence which would relate the seizures to the DPT. Dr. Margolis saw the notebook as such a document. The other notation, "must be 9-12-88" refers to a passage of the note which records the amount of formula Daniel took that day. This entry dates the entire document with reference to a feeding notebook, also in evidence; the third day after the shot was the only day when Daniel drank that specific, noted amount of formula.

The Secret Service concluded that "no further age determination is feasible." The Department of Justice attorney who provided the report to the court and counsel stated in her telefacsimile cover letter that

> ". . . The Secret Service examiner . . . indicated that *it was not possible to tell if the entries were made at the same or different times* because of the deterioration. Any lighter appearance, he indicated was probably due to different amount of pressure on the pen (sic)." (Emphasis added.)

Nonetheless, the special master issued a Decision on Remand, dated the 19th of July, 1994, which again denied compensation on the basis that no Table time onset had been shown.

The special master noted that the petitioners' counsel had not devoted much time to the discussion of the pivotal passage of the exhibit, at the original trial. (Decision on Remand pages 3, 4, App., *infra* at 6a-7a. The special master did note, however, that the entire context of the exhibit was discussed. *Id*. The special master further noted that one medical record would support Table time onset. Decision on Remand, page 5, fn. 2, App., *infra* at 8a. The special master noted that she had received the Secret Service report[6]. But she went on:

> "In conversation with respondent's attorney, the agent

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[6]The special master stated, "The Secret Service cannot determine if the timing of the suspect entries is different from the other entries on the page." Decision on Remand, pg 5, App., *infra* at 8a.

> stated that the lighter appearance of "arm opengs, arched back" and "Zerox" was probably due to a different amount of pressure being applied to the pen. This prompts the court to ***assume*** the following.
>
> "Since both 'Zerox' and 'arm opengs, arched back' were written with a lighter pressure than the rest of the words on the page, they were probably written at the same time. It would be extraordinary to ***assume*** that "arm opengs, arched back" was written at the same time as the surrounding two lines of darker handwriting. Dr. Margolis stated in her original testimony that she wrote "Zerox" on the top left hand corner of the page while compiling documentation in preparation for litigation. The court ***believes*** that Dr. Margolis read over the page and added the symptoms of arm openings and arched back that she thought had occurred then in order to buttress her case. This is also why she read these words aloud in court when no question was pending before her." Decision on Remand, Pg 6, App., *infra* at 9a.

6. Within days, Judge Tidwell had affirmed the special master. The Order recited the standard of review and held that the special master, "under the correct legal standards, properly considered the new evidence and the evidence as a whole and drew reasonable and rational conclusions." Order, July 22, 1994, pg. 2, App., *infra* at .

Appeal to the Federal Circuit followed, and on September 19, 1995, the Court of

Appeals affirmed without opinion. App., *infra*, at .

REASONS FOR GRANTING THE PETITION

The Court of Appeals has refused to review the result of numerous Vaccine Act cases, including the instant case, under circumstances where the result is clearly erroneous, and where meaningful review would recognize and correct deprivation of fundamental fairness. Herein, as in many cases, the Court of Appeals has let stand a decision nullifying the text of the Act as it relates to the proof of events which are not recorded, or incorrectly recorded, in medical records.

The deference practiced by the Court of Appeals, and the refusal to afford meaningful review, has led to the articulation of a doctrine which creates a presumption against petitioners' credibility, and a clear misapplication of one of the important precedents of this court, *United States v. United States Gypsum*, 333 U.S. 364, 396 (1968).

Because the Federal Circuit is the only court of appeals with authority to review Vaccine Act cases, review by this court is necessary to correct that circuit court's serious misapplication of the Act and abdication of review responsibility, to restore the operation of statutory language, and to restore the judicial integrity of the Office of the Special Masters of the United States Court of Federal Claims.

1. The Vaccine Act as originally drafted in 1986 provided for the filing of petitions in the federal district courts, where special masters would be appointed to review the materials presented, and to propose findings of fact and conclusions of law. District courts were empowered to determine *de novo* any

matters involved, under the original provisions of 42 U.S.C. § 300aa-12 (a) through (d). Then, in 1987, before the Act became effective, it was amended, in pertinent part, to contemplate the filing of petitions in the Claims Court (now the Court of Federal Claims). Petitions were to be referred to special masters designated by the Court[7]. Judgement was to be issued by the Court itself, which was empowered to review a special master's proposals *de novo*.

In 1989, the Vaccine Act was amended to empower the special masters to issue a "decision" on a vaccine compensation petition, instead of mere proposed findings of fact and conclusions of law. The *de novo* review by the Claims Court was abolished. The current version of § 12, established by amendment, substituted a standard of review for the Court of Federal Claims, authorizing that court to set aside the findings of fact and conclusions of law of the special master if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[8]

However, no standard of review was specified by congress for appeal to the Federal Circuit Court of Appeals. The Court of Appeals has struggled with this issue. Petitioners urge herein that this court require the Court of Appeals to apply a "clearly erroneous" standard of review, derived from Rule 52, F.R.C.P.

The Federal Circuit, Judge Newman writing, applied the clearly erroneous standard in the case of *Bunting v. Secretary*

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[7]Pub. L. No. 100-203, Title IV, Subtitle D, § 4307, 100 Stat. 1330-224, amending 42 U.S.C. § 300aa-12.

[8]Pub. L. No. 101-239, Title VI, Subtitle D, § 6601, 103 Stat. 2286-90, amending 42 U.S.C. § 300aa-12.

of DHHS, 931 F.2d 867, 871 (Fed. Cir. 1991), a case filed prior to the amendments whcih established the Claims Court standard of review. Amendments to the Act were not effective as to petitions filed before the amendments. *Id.*, fn. 5 at 871. The application of that standard of review led to thorough and painstaking review, and the reversal of the denial of compensation in that case[9].

Then, in the case of *Hines v. Secretary of DHHS*, 940 F.2d 1518, 1524 (Fed. Cir. 1991), Judge Michel expanded on the standard of review, and in effect held that the enactment of the Claims Court standard of review had provided the same standard for the Federal Circuit. Judge Michel's opinion relied, curiously, on authorities which rejected the deference of Rule 52 and its clearly erroneous standard, where the question in issue was the propriety of the District Court setting aside a master's findings.

The issue did not remain settled. Judge Rader, concurring in the judgment in *Grant v. Secretary of DHHS*, 956 F.2d 1144, 1150-51 (Fed. Cir. 1992), noted that Congress had not specified a standard for the Federal Circuit when it changed the relationship between the Claims Court and the Office of Special Masters, and opined that no change had been intended. Judge Rader opted for the traditional "appeal" standard, the "traditional deference standard" of *Bunting*. *Grant, supra,* at 1151.

Thereafter, characterizing the difference in the standards of review as merely "a matter

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[9]The Federal Circuit reviewed the evidence, ruled the petitioner's proof to be sufficient, and held that the special master had applied too high a burden of proof.

for academic debate[10]," Judge Plager wrote in *Munn v. Secretary of DHHS*, 970 F.2d 863, 870-71 (Fed. Cir. 1992) that the Federal Circuit would review the Court of Federal Claims, *not* the special master, and that it would apply the standard of review provided by statute for the lower court.

It took no time for the Federal Circuit to recognize that the standard of review had been made more deferential. Ignoring the fact that *Munn* had not been decided by the time of the appeal in *Phillips v. Secretary of DHHS*, 988 F.2d 111, 112-13 (Fed. Cir. 1993), Judge Plager castigated counsel for bring the appeal, in light of the highly deferential standard of *Munn*.

Again, in *Bradley v. Secretary of DHHS*, 991 F.2d 1570, 1574, n.3 and 1576, n.4 (Fed. Cir.), the judges of the Federal Circuit renewed their debate. Judge Michel critized *Phillips* for suggesting that the review is **less** rigorous than *de novo*, while Judge Plager, concurring, saw the decision as a departure from precedent, and a source of unrealistic hope to litigants that another attempt at compensation could be gained by pursuing appeal to the Federal Circuit. *Id.*, at 1576-78.

Finally, in *Cucuras v. Secretary of DHHS*, 993 F.2d 1525, 1527 (Fed. Cir. 1993), *Jay v. Secretary of DHHS*, 998 F.2d 979, 982 (Fed. Cir. 1993) and *Hellebrand v. Secretary of DHHS*, 999 F.2d 1565, 1569 (Fed. Cir. 1993), the standard of review is described as de novo review of the Claims Court legal conclusions under the arbitrary and capricious standard.

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[10]The determinative nature of the more deferential standard applied by the Federal Circuit is of course the very essence of this petition for review by *certiorari*, under the premise of Rule 10.1 (a). The refusal of the Federal Circuit to afford meaningful review is a far departure from the accepted and usual course of judicial proceedings.

It is recognized as a "highly deferential standard." *Cucuras, supra,* 993 F.2d at 1527.

a. The Rule under which the instant case and many others is upheld without precedential opinion is Fed. Cir. R. 36, "Entry of Judgement." Its text is as follows:

> Judgment of affirmance without opinion. The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following circumstances exist:
>
> (a) the judgment, decision or order of the trial court appealed from is based on findings that are not clearly erroneous;
>
> * * *
>
> (d) the decision of an administrative agency warrants affirmance under the standard of review in the staute authorizing the petition for review; or[11]
>
> (e) a judgment or decision has been entered without an error of law; and an opinion would have no precedential value.

The problem which arises under a too-deferential standard of review is that the court may not recognize the "legal" nature of a question[12], or may develop an inclination, as

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[11] The omitted subsections of the rule deal with summary judgement and jury verdicts, inapplicable here.

[12] "'Legal' is one of those slippery legal terms, like 'jurisdiction.'" Plager, CJ, concurring in part and dissenting in part in *Bradley, supra,* 991 F.2d at 1570, fn. 1.

has occured in the case of vaccine appeals to the Federal Circuit, against entertaining the arguments of the appellant.

> There seems to be no hard and fast distinction between questions of law and questions of fact; . . .and since there are so many cases on the border line between ultimate facts and conclusions of facts, *i.e.*, law, the way is open to a court with understanding to accomplish substantial justice, whatever the formula. Messrs. Arnold and James point out that "the elasticity of these two escapes" of review of an error of law or of an arbitrary finding without evidence to support it, . . . "is sufficient to give the Court almost complete power to review if it wants to take it." Clark and Stone, *Review of Findings of Fact*, 4 U. Chi. L. Rev. 190, 211 n. 93 (citations omitted) (1937).

It seems clear that there were legal issues in the appeal below[13], yet the Federal Circuit after deliberating for several months did not discuss them. This is not a wise utilization of resources; to the contrary, it is leaving a vaccuum where there should be the development of the law. *See*, Cooper, *Civil*

See generally the discussion in *Bose Corporation v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501-02, 104 S.Ct. 1949, 1959-60, 80 L.Ed.2d 502 (1984).

[13]For instance, in addition to the questionable application of the *U.S. Gypsum* case, discussed *infra* in argument 3, there was the very substantial legal question of whether a special master could rule without evidentiary support, or become her own handwriting expert, where the forensic scientists with the Secret Service had been unable to illuminate the issue with their scientific analysis.

Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review, 63 Notre Dame L. Rev. 645 (1988).

The arbitrary and capricious standard is the very most deferential of standards, especially as implemented by the Federal Circuit Court of Appeals. The pronouncements of the court make it clear that the court is hostile to vaccine compensation appeals. The "clearly erroneous" standard, although deferential, is likely to lead to more thorough review. *See, generally,* Childress and Davis, Federal Standards of Review, 2nd. ed., 1992.

The petitioners respectfully submit that this court should bring to the Vaccine Court that level of appellate involvement which the other courts of appeal have in relation to district courts. To fail in so doing will leave unrestricted the power of the special masters, and sustain their unresponsiveness to the institutional machinery of democratic law. *See*, Carrington, *The Power of District Judges and the Responsibility of the Courts of Appeals*, 3 Georgia L. Rev. 507 (1969).

b. There is no hint of congressional intention to limit the ordinary review power of the court of appeals. The adoption of the standard of review in 1989 was designed to restructure the system, but there is no hint of an intention to apply the standard to the court of appeals. In fact, at the time of amendment, it is clear that the *government* was seen as taking inappropriate appeals. The House Conference Committee condemned the government for allowing the *ex parte* proceedings which had been occurring (stating, "Respondents have withheld sufficient personnel and administrative supports . . ."), and went on to implicitly condemn the appeals--the only litigation where the government was even appearing--then being pursued. (The Committee went on to state that respondents

were also mounting "defenses incompatible with a no-fault system of compensation." House Conf. Report 101-386, page 513, *reprinted*, 1989 USCCAN 3116). Thus, Congress called for a re-dedication of all parties to less adversarial proceedings (*Id.*, at page 512, *reprinted* at 1989 USCCAN 3115), and even suggested that special masters need not be lawyers. *Id.*, page 515, *reprinted*, page 3118.

The very idea of separately-headed section describing "appeal[14]." from the special masters and the court as a whole to a court of appeals implies that the standard of Rule 52 is the standard of review. The Vaccine Act at § 300aa-12 (a) states that the special masters and the court share the jurisdiction to decide a petition; the provision of subsection (e) which includes the arbitrary and capricious standard of review is under the heading, "Action by the United States Claims Court." The standard of review, then, is not repeated in the context of "appeal." And Subsection (f), entitled "Appeals," is silent with regard to a standard of review.

c. The case of *United States v. United States Gypsum*, 333 U.S. 364, 395 (1948), is the centerpiece of this appeal in all respects[15]. It provides the enduring, best and most clearcut standard for review, a standard which would compel the reversal of the decision below, and of many that have been unsuccessfully appealed to the court of appeals. This standard requires a review of

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[14]The Act provides at § 300aa-12 (e) for "action by the United States Claims Court [United States Court of Federal Claims]" via a "motion to have the court review the decision."

[15]See argument 3, *infra*, for discussion of the untoward "statute of frauds" which the Office of Special Masters has developed via an extension of the "clearly erroneous" reversal ruling therein.

the entire record, to the extent that, even if the evidence could sustain the outcome at trial, the court must reverse if it is left with the definite and firm conviction that a mistake has been made. Rule 52 contains the same language with regard to ordinary trial courts as the Vaccine Act provisions of 42 U.S.C. § 300aa-12 (a) (e) and (f) use when they refer to both the special masters and Court of Federal Claims. These tribunals--district courts by themselves and the "Vaccine Court[16]" as a combined entity of special masters and judges--issue findings of facts and conclusions of law after bench trials. Such trial court judgments are entitled to deference, but are not as sacrosanct as the verdict of a jury. Rule 52 and other rules provide review under the clearly erroneous standard for everything but the verdict of juries; the standard applies with special masters, magistrates, and others. 1 Childress and Davis, *supra*, §2.03. It is to be presumed that the failure of congress to repeat the standard from § 12 (e), where it is applied to "action" by the Court of Federal Claims, in the enactment of subsection 12 (f), which provides for appeal to the Federal Circuit, was intentional. The rule in the Court of Appeals should be repudiated as a departure from and an unintended embellishment of the statute; the statute is to be implemented and enforced as it is written. *See, Shalala v. Whitecotton*, 115 S.Ct. 1477 (1995).

2. The decision in this matter illustrates a breakdown in the function of the special master as an "inquisitory" judicial official with the duty to investigate the case. The decision's explicit basis is the

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[16]This description for the combination of court and office of special masters is from *Schafer v. American Cyanamid Co.*, 20 F.3d 1 (1st Cir. 1994).

special master's assumptions. App., *infra* at 8a.

It is a fundamental aspect of due process that the basis for findings must always appear on the record of the proceeding being decided. *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (Need for basis in evidence is "elementary requirement.")

In the case of *Bunting v. Secretary of DHHS*, 931 F.2d 867 (Fed. Cir. 1991), the Federal Circuit, utilizing "clearly erroneous" review, held, *inter alia*, that a trier of fact cannot substitute his or her own opinion for that of a medical expert[17]. *See also McClendon v. Secretary of DHHS*, 24 Cl. Ct. 329 (1991). If anything, a non-expert foray into the thicket of handwriting analysis is even more fraught with peril. The special masters have heard medical evidence for years in this specialized program. But handwriting analysis is far more unusual and arcane. *See, e.g.*, Qualifications of Examiners of Questioned Documents, 16 Am. Jur. Proof of Facts 481 (1965); Morrill "The Document Examiner--Scientist or Sciolist?" 9 The Prosecutor 206 (1973).

The special master's referral of the document to the Secret Service in the first place illustrates the plain and simple truth that the examination of questioned documents is a scientific matter, if it is legitimate at all. *See*, generally, Kelly, Questioned Document Examination, *Scientific and Expert Evidence* 695 (2nd. ed. 1991).

The development of an "inquisitorial" system was designed to facilitate the quick and simple adjudication of claims made by

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[17]The opinion of a non-expert must have a "rational basis in perception." F.R.E. 701. There is nothing on the record which makes the opinion offered by the special master rational.

petitioners. It was not intended as a substitute for due process. Even under a "substantial evidence" analysis, which is the theoretical correlative of the "arbitrary and capricious" standard, the lack of evidence on the record to support a finding is fatal. As noted in the case of *Association of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve System*, 745 F.2d 677, 683 (D.C. Cir. 1984):

> (i)n their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same. The former is only a specific application of the latter, separately recited in the APA not to establish a more rigorous standard of factual support but to emphasize that in the case of formal proceedings the *factual support must be found in the closed record* as opposed to elsewhere. (Emphasis added.)

The Court should grant *certiorari* in this matter to enforce the dictates of due process, to affirm the right to meet and address "evidence" or anything which passes for it under the inquisitorial structure of the Act. It is a violation of due process for the basis of a decision to flow from extra-judicial or off-the-record source. *See also* § 300aa-13.

3. The special master ruled herein, even before her finding of fraud on remand, that testimony is not entitled to as much weight as medical records. She cited the cases of *United States v. United States Gypsum*, 333 U.S. 364, 396 (1968) and *Montgomery Coca-Cola Bottling Co. v. United States*, 615 F.2d 1318, 1328 (Ct. Cl. 1980), as being "well established case law" which "holds

that information in contemporary medical records is more believable than that produced years later at trial." Decision, App., *infra* at 25a. But these cases stand for no such proposition. They are, instead, among that most rare breed of cases, where the trial court's factfinding is repudiated as illogical--and "clearly erroneous"--by the appellate court.

The language of this Court in *U.S. Gypsum* is instructive as to the narrow scope of the holding which found clear error in factfinding:

> *The government* relied very largely on documentary exhibits, and *called as witnesses* many of the *authors of the documents*. Both on direct and cross examination counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses' testimony was conflicting. On cross examination most of *the witnesses denied* that they had acted in concert in securing patent licenses or *that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight*, particularly when the crucial issues involve mixed questions of law and fact." 68 S. Ct. at 542, emphasis added.

Most obviously, *U.S. Gypsum* was not a "medical records" case. Nor is the instant case one where the issue was ultimately a legal conclusion, such as collusion in patent applications. Most significant of all, however, is the case of *United States v. International Business Machines*, 66 F.R.D. 154

(S.D.N.Y. 1974), a case where special masters were appointed to oversee discovery in antitrust proceedings. The government insisted in that case that the so called "*Gypsum*" rule would require the special master "***to resolve evidentiary conflicts. . . in favor of the conclusion dictated by the contemporaneous documents.***" (Emphasis in the original). The court characterized this position as one taken "in the zeal of advocacy," and rejected the government's contentions relating to the substantive nature of the rule. *Id.*, 66 F.R.D. at fn. 7, page 154.

The petitioners are aware that the Federal Circuit and the Court of Federal Claims have upheld opinions[18] based on the vaccine equivalent of the "Gypsum" rule. But bad law is bad law, and because the "credibility of medical records" doctrine is bad law with a pernicious influence, it should be questioned and reversed, in light of its lack of basis in precedent[19]. Moreover, the Court must recognize the obvious emasculation of 42 U.S.C. § 300aa 13 (b) (2), which provides explicitly that the special master or court may find the first symptom or manifestation of onset or significant aggravation of an injury, disability, illness, condition or death described in a petition occurred within the time period described in the Vaccine Injury Table even though the occurrence of such symptom or manifestation

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[18] *See, e.g., Cucuras v. Secretary, supra,* wherein the "arbitrary and capricious" review was most uncritical. The special master had even called the rule a "statute of frauds," but the Court saw little reason to examine the basis of the rule as a legal doctrine.

[19] See Rule 10.1 (c), which regards such a departure from an applicable decision of this Court as a separate basis for *certiorari*.

was not recorded or was incorrectly recorded as having occurred outside such period. For the statute to make such a statement, which could be regarded in the abstract as a recapitulation of mainstream evidence law, is the embodiment of congressional recognition for the blindness of the medical establishment to vaccine injuries[20].

This case, then, is not a case for deferential review of factfinding. The import of documents, as they relate to credibility, can be evaluated as well by an appellate court as a trial court. Thus there should be no deference to the special master's "weighing" of documents. Documents as such have no demeanor. *See, Bowles v. Carnegie-Illinois Steel Corporation*, 149 F.2d 545, 546 (7th Cir. 1945) (in the absence of oral testimony an appeal court is in the same position as the trial court in evaluating evidence); *see also* 5 C.J.S. 114-118, *Appeal and Error* § 704 and cases cited therein.

The "credibility of records" rule shows favoritism of hearsay (or even hearsay-upon-hearsay) over sworn testimony. It is bad evidence law. Its expression as "well-settled caselaw" is a perversion of the rule of *stare decisis*. The decision below, like hundreds of other vaccine case decisions, is infected by this erroneous and egregious standard. The statute provides unequivocally that the medical records do not control. But the rule states that they do. The rule should be eliminated. Unexamined precedent, blindly followed, can do the greatest injustice. This

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[20]It is vital to recognize that the Vaccine Compensation Program came about as a solution to a complex problem. A chief aspect of that problem has been that the medical profession had been indoctrinated with the notion that there is no such thing as a vaccine injury. As a result, the role of vaccine in a childhood encephalopathy is a neglected issue. And date of onset is not a clinical issue at any rate.

Court should reject the spurious basis of the rule.

CONCLUSION

The Petition for a writ of *certiorari* should be granted.

Respectfully submitted this 18th day of December, 1995.

BY:

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APPENDIX A

United States Court Of
Appeals for the Federal Circuit

94-5162

GEORGE HERBST NORTHRUP and FAYE RUTH NORTHRUP, Parents and Next Friends of DANIEL CHARLES NORTHRUP,

Petitioners-Appellants,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.

Judgement

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS in CASE NO(S) 90-1013V

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (ARCHER, Chief Judge, SKELTON, Senior Circuit Judge, and MICHEL, Circuit Judge):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED September 19, 1995 s/ Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: NOV. 13 1995

APPENDIX B

In The United States Court
Of Federal Claims

OFFICE OF THE SPECIAL MASTERS

July 29, 1994

GEORGE HERBST NORTHRUP AND
FAYE RUTH MARGOLIS, PARENTS
AND NEXT FRIENDS OF DANIEL
CHARLES NORTHRUP,

Petitioners,

vs. No. 90-1013V

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

Robert T. Moxley, Cheyenne, WY, for petitioners.
Richard A. Schollman, Washington, DC, for respondent.

Pursuant to the court's order of July 22, 1994, affirming the Special Master's February 3, 1994, and July 19, 1994, orders of dismissal,

IT IS ORDERED AND ADJUDGED this date, pursuant to Appendix J ¶30 that the petition is dismissed.

David A. Lampen
Clerk of Court

July 29, 1994 By: S/_____

Deputy Clerk

APPENDIX C

In The United States Court
Of Federal Claims

No. 90-1013 V

(FILED: July 22, 1994)

GEORGE HERBST NORTHRUP and FAYE RUTH NORTHRUP, Parents and Next Friends of DANIEL CHARLES NORTHRUP,

Petitioners,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Robert T. Moxley, Cheyenne, WY, for petitioners.

Richard A. Schollman, Washington, DC, for respondent.

ORDER

TIDWELL, *Judge:*

When reviewing a special master's decision, this court has authority to uphold the special master, to set aside findings of fact or conclusions of law found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and to remand to the special master. 42 U.S.C. § 300aa-12(e)(2)(1988 & Supp. 1992). "If the special master has considered the relevant evidence of record, drawn plausible inferences and articulated a rational basis for the decision, reversible error will be extremely difficult to demonstrate." *Hines v. Secretary of HHS*, 940 F.2d 1518, 1528

(Fed. Cir. 1991).

On February 3, 1994, Special Master Millman dismissed petitioners for failure to satisfy their burden of proving on-Table onset of seizures. The court remanded the case to the Special Master on April 19, 1994, to consider newly discovered evidence, a stenographer's notebook containing Daniel's mother's inscription written during the time period at issue herein. On July 19, 1994, after consideration of the new evidence, the Special Master again dismissed petitioners for not providing evidence of an on-Table onset of seizures.

Upon review of the decision on remand, the court finds that the Special Master, upon the correct legal standards, properly considered the new evidence and the evidence as a whole and drew reasonable and rational conclusions. The Special Master's findings and conclusions are within accordance of law, and arbitrary, capricious, or an abuse of discretion. Therefore, the Court affirms the February 3, 1994, and July 19, 1994 orders dismissing petitioner's claim. The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

MOODY R. TIDWELL
Judge

APPENDIX D

In The United States Court
Of Federal Claims

OFFICE OF THE SPECIAL MASTERS

July 19, 1994

GEORGE HERBST NORTHRUP AND
FAYE RUTH MARGOLIS, PARENTS
AND NEXT FRIENDS OF DANIEL
CHARLES NORTHRUP,

Petitioners,

vs. No. 90-1013V

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

Robert T. Moxley, Cheyenne, WY, for petitioners. Richard A. Schollman, Washington, DC, for respondent.

DECISION ON REMAND

On behalf of Daniel Charles Northrup (hereinafter "Daniel"), petitioners filed an application on September 17, 1990 for compensation under the National Childhood Vaccine Injury Act of 1986.

The court issued a decision dismissing the petition on February 3, 1994 based on petitioners' failure to satisfy their burden of proving on-Table onset of seizures. The court found the contemporaneous medical records, none of which supported an onset occurring within three days of vaccination, to be more credible that the testimony of petitioners, particularly because petitioners' descriptions of arm openings and back archings were directly contradicted by their live-in babysitter, who described arms circling forward and hunching over.

Petitioners moved for review on March 7, 1994. The Honorable Moody R. Tidwell remanded the case to

the undersigned on April 19, 1994 for the purpose of considering newly discovered evidence, i.e., a spiral stenographer's notebook that Dr. Margolis, Daniel's mother, had inscribed during the relevant time period at issue herein. Five pages of this "newly discovered evidence" were already in evidence as Petitioners' Exhibits 1, 2, and 3 from the April 20, 1993 hearing, but the remaining pages were unavailable until petitioners recently found them.

Although this newly discovered evidence was presented to Judge Tidwell as evidence as to the onset of Daniel's seizures, the pages that were not previously submitted during the April 1993 hearing and that constitute the new evidence do not touch on the onset of his seizures. Only page 1 of P. Ex. 1 (now marked page 5 of P. new Ex. 6) discusses the onset.

Judge Tidwell's mandate to this court in his Remand Order was "to consider the new evidence." In compliance with Judge Tidwell's Order, this court held a remand hearing on June 29, 1994.[1] It became apparent as petitioners proceeded that the sole purpose of the remand hearing was to have the court consider page 5 of P. new Ex. 6.

At the April 1993 hearing, petitioners' counsel never questioned Daniel's mother, Dr. Margolis (a psychologist), regarding the notation on page 5 of P. new Ex. 6, "arm opengs [sic], arched back." As reflected on page 43 of the hearing's transcript, the court had asked respondent's attorney if he had any objection to petitioners' counsel's exhibits. Respondent's counsel replied that he did not. At which point, Dr. Margolis, without any question pending before her stated, "This says, 'Arm opening, arched back.'" Petitioners' counsel then asked Dr. Margolis if that notation was in paragraph 7 of page 1 (now page 5, P. new Ex.6) and she replied in the affirmative. That was the extent of petitioners' counsel's discussion regarding this information.

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[1]Petitioners proffered Exhibit 7, which consisted of photographs petitioners took some time in September 1988 of Daniel on his back with his arms up, purportedly depicting seizure activity. Since these photographs were not newly discovered evidence, but available at the time of trial on April 20, 1993, the court did not admit them into evidence.

Petitioners' counsel spent the rest of his time exploring the remaining information on this page. Dr. Margolis stated at page 37, that she made these notes (P. old Exs. 1,2, and 3) as a guide so that she could call the doctor because Daniel was so sick.

Petitioners' counsel then asked Dr. Margolis about the notation in the middle of the page, "[must be 9-12-88]." Dr. Northrup, Daniel's father (another psychologist), indicated that he wrote that date when he and his wife were gathering documents in preparation for litigation. Tr. at 39. They determined page 5 was prepared on September 12, 1988 by comparing the recorded amount of fluid Daniel drank that day with the amount recorded in the notebook they kept on his feedings. Tr. at 39-40.

Petitioners' counsel then referred to the notation that Daniel was cranky, cried and was quick to startle. Tr. at 40. Dr. Margolis testified that this meant Daniel would make a sudden move and open his eyes widely for no apparent reason. Tr. at 40-41.

Petitioners' counsel then called Dr. Margolis' attention to the notation that Daniel had had a booster shot on Friday, 9-9, but had never run fever. He also queried her about the notation that she meant to ask the doctor what he thought Daniel had, ask him about what Daniel should eat, whether he should take aspirin and anything else. She was going to mention that Daniel had a small heart murmur. Tr. at 41.

Petitioners' counsel asked Dr. Margolis about he notation in the lower right hand corner that mentioned swelling and a hot lump at the injection site. Tr. at 42.

The court listened to Petitioners testify that Daniel had arm openings within two days of the vaccination, on Sunday, September 11, 1988 (although Dr. Northrup did not see them occur on Sunday), continuing with increasing intensity until October 3, 1988, which is the first medical record to note abnormal movements. The history recorded at Lenox Hill Hospital on October 10, 1988 indicates that the parents gave a history of a ten day interval between the DPT vaccination and the onset of Daniel's seizures.

Petitioners now, through their claim of newly found evidence, i.e. the stenographer's notebook, attempt to have this court reconsider the evidence that was already before it in the first hearing. The documentation in the parents' notebook that Daniel was opening his arms and arching his back three days after the DPT vaccination supports their testimony

but is markedly different from the histories they gave to treating doctors and to the doctors at Lenox Hill Hospital.[2] It does not eliminate the discrepancy between their description of Daniel's "seizures" as arm openings with back arched and that of their babysitter, Vida Grant, as hunching forward.

On July 14, 1994, this court issued a Report to Judge containing its request that respondent have the Secret Service analyze the writings "arm opengs, arched back" and 'Zerox[sic]" (in the upper left hand side of the page) because they were fainter that the rest of the writing on the page (except for Dr. Northrup's notation "must be 9-12-88"). The report of the Secret Service and a recounting of the agent's conversation with respondent's counsel has this day been provided to the court. The Secret Service cannot determine if the timing of the suspect entries is different from the other entries on the page. It has determined that the same type of pen, a black Bic, was used for all the handwriting on the page, except for Dr. Northrup's notation "must be 9-12-88."

In conversation with respondent's attorney, the agent stated that the lighter appearance of "arm opengs, arched back" and "Zerox" was probably due to a different amount of pressure being applied to the pen. This prompts the court to assume the following.

Since both "Zerox" and "arm opengs, arched back" were written with a lighter pressure that the rest of the words on the page, they were probably written at the same time. It would be extraordinary to assume that "arm opengs, arched back" was written at the same time as the surrounding two lines of darker handwriting. Dr. Margolis stated in her original testimony that she wrote "Zerox" on the top left hand corner of the page while compiling documentation in preparation for litigation. The court believes that Dr. Margolis read over the page and added the symptoms of arm openings and arched back that she thought had occurred then in

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[2]There is one record, a pediatric nursing admission assessment for Lenox Hill Hospital, October 11, 1988, which states Daniel slept the past month except for seizures (with a question mark). Med. Recs. at 106. This is the only medical record that generally supports onset of seizures within Table time. Every history given to a doctor negates it.

order to buttress her case. This is also why she read these words aloud in court when no question was pending before her.

This court finds Dr. Margolis' memory less credible today, in the midst of litigation, then it was when she or her husband gave histories to various doctors. It is well-established in case law that information contained in contemporary medical records is more believable than that produced years later at trial. United States v. Unites States Gypsum Co., 333 U.S. 364, 396 (1968); Montgomery Coca-Cola Bottling Co. v. United States, 615 F.2d 1318, 1328 (Cl. Ct. 1980).

To rule for petitioners now would be to agree that all the medical histories, except for one nurse's note, are in error, and that the suspect addition to her memorandum to herself (purportedly kept to remind her what to say to doctors) is accurate. Her testimony makes no sense. why, when she or her husband gave doctors a history of Daniel's seizures, did they tell them onset occurred ten days after the vaccination, if they indeed occurred two or three days after the vaccination and this was so inscribed in their book?[3]

Putting the merits of the evidence aside for one moment, this court is concerned with the procedural posture of this case. This court cannot fathom why petitioners filed a motion for review with the U.S. Court of Federal Claims based on newly discovered evidence when their real interest was in emphasizing page 5 which was already in evidence before this

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[3]The court is aware that Dr. Margolis or Dr. Northrup inaccurately told the doctors at Lenox Hill Hospital that Daniel received his DPT vaccination on September 12th, not September 9th. If they had consulted their stenographer's notebook, they would have seen the notation of the September 9th vaccination. However, the court is not prepared to accept that such dating inaccuracy (which is understandable) applies as well to the history they gave that there was a ten day gap between vaccination and the onset of seizures. If Daniel had begun seizing two days after the vaccination, the court expects that the parents would have said onset was within a few days, or within a week, but not the considerable gap of within ten days. The parents have never explained satisfactorily the discrepancy between this contemporaneous history and what they now allege.

court. Since they were timely in filing a motion to review, they could just as well have moved this court to reconsider its decision based on petitioners' counsel's recent appreciation of the statement of arm openings and back arching. This court had jurisdiction until petitioners filed their motion for review. Patton v. Secretary of HHS, Nos. 93-5187, 94-5002 (Fed. Cir. June 2, 1994).

This court is bound by the terms of Judge Tidwell's remand order "to consider the new evidence." The new evidence (i.e., the pages not in evidence at the first hearing) does not provide any information relevant to the issue of Daniel's seizure activity onset.

Moreover, although this court views page 5 with more interest than at the April 1993 hearing, this court still does not recommend to Judge Tidwell that he issue an order in favor of petitioners. The pertinent notation on page 5, "Arm opengs, arched back," appear to be later insertions, done when petitioners were amassing papers in preparation for litigation. The court is loathe to accuse petitioners of submitting a document containing fraudulent information, i.e. a later-inserted entry of arm openings and arched back, in order to buttress their case, but it is also loathe to accept what on its face seems suspiciously altered. The court thinks that, at some point, petitioners were convinced that Daniel's seizures began on September 12, 1988 and decided to "prove" it by inserting the entry of "arm opengs, arched back" at the same time Dr. Margolis wrote "Zerox" and Dr. Northrup wrote "must be 9-12-88."

In light of the lack of contemporaneous medical records that not only do not support petitioners' allegation of onset but are in direct contradiction of petitioners assertions, together with the suspicious nature of page 5 of P. new Ex. 6, this court does not have confidence that petitioners' have tipped the balance in providing evidence of an on-Table onset of seizures.

Strictly within the mandates of considering the "new evidence," this court continues to hold that petitioners are not entitled to compensation. This court does not recommend to Judge Tidwell outside the ambit of the new evidence, and considering the evidence as a whole, that he issue an order based on the entire case which grants compensation to petitioners. The court recommends that Judge Tidwell affirms the dismissal order of this court.

DATED: July 19, 1994

s_____
Laura D. Millman
Special Master

APPENDIX E

In The United States Court
Of Federal Claims

OFFICE OF THE SPECIAL MASTERS

June 30,1994

GEORGE HERBST NORTHRUP AND
FAYE RUTH MARGOLIS, PARENTS
AND NEXT FRIENDS OF DANIEL
CHARLES NORTHRUP,

Petitioners,

vs. No. 90-1013V

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

Robert T. Moxley, Cheyenne, WY, for petitioners.
Richard A. Schollman, Washington, DC, for respondent.

ORDER

On behalf of Daniel Charles Northrup (hereinafter "Daniel"), petitioners filed an application on September 17, 1990 for compensation under the National Childhood Vaccine Injury Act of 1986.

The court issued a decision dismissing the petition on February 3, 1994 based on petitioners' failure to satisfy their burden of proving on-Table onset of seizures. The court found the contemporaneous medical records, none of which supported an onset occurring within three days of vaccination, to be more credible than the testimony of petitioners, particularly because petitioners' descriptions of arm openings and back archings were directly contradicted by their live-in babysitter, who described arms circling forward and hunching over.

Petitioners moved for review on March 7, 1994.

The Honorable Moody R. Tidwell remanded the case to the undersigned on April 19, 1994 for the purpose of considering newly discovered evidence, i.e., a spiral stenographer's notebook that Dr. Margolis, Daniel's mother, had inscribed during the relevant time period at issue herein. Five pages of this "newly discovered evidence" were already in evidence as Petitioners' Exhibits 1, 2, and 3 from the April 20, 1993 hearing, but the remaining pages were unavailable until petitioners recently found them.

Although this newly discovered evidence was presented to Judge Tidwell as evidence as to the onset of Daniel's seizures, the pages that were not previously submitted during the April 1993 hearing and that constitute the new evidence do not touch on the onset of his seizures. Only page one of P. Ex. 1 (now marked page 5 of P. new Ex. 6) discusses the onset.

Judge Tidwell's mandate to this court in his Remand Order was "to consider the new evidence." In compliance with Judge Tidwell's Order, this court held a remand hearing on June 29, 1994.[1] It became apparent as petitioners proceeded that the sole purpose of the remand hearing was to have the court consider page five of P. new Ex. 6.

At the April 1993 hearing, petitioners' counsel never questioned Daniel's mother, Dr. Margolis (a psychologist), regarding the notation on page 5 of P. new Ex. 6, "arm openings, arched back." As reflected on page 43 of the hearing's transcript, the court had asked respondent's attorney if he had any objection to petitioners' counsel's exhibits. Respondent's counsel replied that he did not. At which point, Dr. Margolis, without any question pending before her stated, "This says, 'Arm opening, arched back.'" Petitioners' counsel then asked Dr. Margolis if that notation was in paragraph 7 of page 1 (now page 5, P. new Ex.6) and she replied in the affirmative. That was the extent of petitioners' counsel's discussion regarding this information.

Petitioners' counsel spent the rest of his time

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[1] Petitioners proffered Exhibit 7, which consisted of photographs petitioners took some time in September 1988 of Daniel on his back with his arms up, purportedly depicting seizure activity. Since these photographs were not newly discovered evidence, but available at the time of trial on April 20, 1993, the court did not admit them into evidence.

exploring the remaining information on this page. Dr. Margolis stated at page 37, that she made these notes (P. old Exs. 1,2, and 3) as a guide so that she could call the doctor because Daniel was so sick.

Petitioners' counsel then asked Dr. Margolis about the notation in the middle of the page, "[must be 9-12-88]." Dr. Northrup, Daniel's father (another psychologist), indicated that he wrote that date when he and his wife were gathering documents in preparation for litigation. Tr. at 39. They determined page five was prepared on September 12, 1988 by comparing the recorded amount of fluid drunk by Daniel that day with the amount recorded in the notebook they kept on feedings. Tr. at 39-40.

Petitioners' counsel then referred to the notation that Daniel was cranky, cried and was quick to startle. Tr. at 40. Dr. Margolis testified that this meant Daniel would make a sudden move and open his eyes widely for no apparent reason. Tr. at 40-41.

Petitioners' counsel then called Dr. Margolis' attention to the notation that Daniel had had a booster shot on Friday, 9-9, but had never run fever. He also queried her about the notation that she meant to ask the doctor what he thought Daniel had, ask him about what Daniel should eat, whether he should take aspirin and anything else. She was also going to mention that Daniel had a small heart murmur. Tr. at 41.

Petitioners' counsel asked Dr. Margolis about he notation in the lower right hand corner that mentioned swelling and a hot lump at the injection site. Tr. at 42.

The court listened to petitioners testify that Daniel had arm openings within two days of the vaccination, on Sunday, September 11, 1988 (although Dr. Northrup did not see them on Sunday), continuing with increasing intensity until October 3, 1988, which is the first medical record to note abnormal movements. The history recorded at Lenox Hill Hospital on October 10, 1988 indicates that the parents gave a history of a ten day interval between the DPT vaccination and the onset of Daniel's seizures.

Petitioners now, through their claim of newly found evidence, i.e. the stenographer's notebook, attempt to have this court reconsider the evidence that was already before it in the first hearing. The documentation in the parents' notebook that Daniel was opening his arms and arching his back three days after the DPT vaccination supports their testimony but is markedly different from the histories they gave to

treating doctors and to the doctors at Lenox Hill Hospital.[2] It does not eliminate the discrepancy between their description of Daniel's "seizures" and that of their babysitter Vida Grant.

Petitioners' counsel fails to call the court's attention to the significance of the notation on p. 5 that Daniel had arm openings and back arching did not advance petitioners' assertion of onset which most of the contemporaneous medical records contradict. To rule for petitioners now would be to agree that all the medical histories, except for one nurse's note, are in error, and that Vida Grant was mistaken when she depicted Daniel as hunching forward rather than arching back, whereas a scribbled note (about which the court has some doubt, see infra) is accurate.

Putting the merits of the evidence aside for one moment, this court is concerned with the procedural posture of this case. This court cannot fathom why petitioners filed a motion for review with the U.S. Court of Federal Claims based on newly discovered evidence when their real interest was in emphasizing page 5 which was already in evidence before this court. Since they were timely in filing a motion to review, they could just as well have moved this court to reconsider its decision based on petitioners' counsel's recent appreciation of the importance of a contemporaneous statement of arm openings and back arching. This court had jurisdiction until petitioners filed their motion for review. Patton v. Secretary of HHS, Nos. 93-5187, 94-5002 (Fed. Cir. June 2, 1994).

This court is bound by the terms of Judge Tidwell's remand order "to consider the new evidence." The new evidence, i.e., the pages not in evidence at the first trial, does not provide any information relevant to the issue of Daniel's seizure activity onset.

Moreover, although this court views page 5 with more interest than at the April 1993 hearing, since petitioners' counsel has emphasized

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[2]There is one record, a pediatric nursing admission assessment for Lenox Hill Hospital, October 11, 1988, which states Daniel slept the past month except for seizures (with a question mark). Med. Recs. at 106. This is the only medical record that generally supports onset of seizures within Table time. Every history given to a doctor negates it.

it by asking Dr. Margolis questions about it during the June 29, 1994 remand hearing, this court still does not recommend to Judge Tidwell that he issue an order in favor of petitioners. The pertinent notation on page 5, "Arm opengs [sic], arched back," look as if they are later insertions. They are written in a fainter ink than the rest of the page, except for the word "Zerox [sic]" on the top left which Dr. Margolis admitted she wrote when she was gathering documents for her attorney in preparation for litigation. Moreover, Dr. Margolis admitted that her husband wrote the words "[must be 9-12-88]" on the same page for the same purpose. The court is loathe to accuse petitioners of submitting a document containing fraudulent information, i.e. a later-inserted entry of arm openings and arched back, in order to buttress their case, but it is also loathe to accept what on its face seems suspiciously altered.

Therefore, the court orders respondent to obtain expert analysis of page 5 (which is currently in the court's possession) to determine based on scientific evidence if the words "Arm Opengs, arched back" were inserted at a different time than the rest of the page's handwriting and, in fact, at the same time as the notation "Zerox." The court reminds counsel that its remand opinion is due July 19, 1994.

IT IS SO ORDERED.

DATED: June 30, 1994

s/_____
Laura D. Millman
Special Master

APPENDIX F

In The United States Court
Of Federal Claims

OFFICE OF THE SPECIAL MASTERS

February 3, 1994

GEORGE HERBST NORTHRUP AND
FAYE RUTH MARGOLIS, PARENTS
AND NEXT FRIENDS OF DANIEL
CHARLES NORTHRUP,

Petitioners,

vs. No. 90-1013V

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

Robert T. Moxley, Cheyenne, WY, for petitioners. Richard A. Schollman, Washington, DC, for respondent.

DECISION

MILLMAN, Special Master

On behalf of Daniel Charles Northrup (hereinafter "Daniel"), petitioners filed an application for compensation under the National Childhood Vaccine Injury Act of 1986.[1] (hereinafter, the "Vaccine Act" or the "Act"). Petitioners have satisfied the jurisdictional prerequisites provided in §300aa-11 (c) of the Act

[1]The statutory provisions governing the Vaccine Act are found in 42 U.S.C.A. § 300aa-1 et seq. (West 1991). The National Vaccine Injury Compensation Program comprises Part 2 of the Vaccine Act. For convenience, further reference will be to the relevant subsection of 42 U.S.C. § 300aa.

by showing that Daniel has not previously collected an award or settlement of a civil action for damages arising from the vaccine injury, that they have incurred $1,000 in unreimbursable expenses, and that the DPT vaccination was administered to Daniel in the United States.

Petitioners allege that Daniel suffered significant aggravation of his pre-existing tuberous sclerosis (TS) in the form of a residual disorder within the Table time limits of the Act. 42 U.S.C. § 300aa-14(a)(D) and (E). Respondent defends with the assertion that Daniel's seizure disorder began outside the Table time limits of the Act. In the alternative, respondent claims DPT did not significantly aggravate Daniel's pre-existing TS 43 U.S.C. § 300aa-13(a)(1)(B).

The court held two hearings: October 21, 1991 (at the Mayo Clinic) and April 20, 1993. Testifying for petitioners were Dr. Manuel Gomez (Mayo Clinic), Faye [Northrup] Margolis, George Northrup, and Vida Grant. Because of the medical testimony already amassed in TS cases before this Special Master, and the pivotal question of whether Daniel's seizures began within three days of his DPT vaccination, the local hearing was restricted to lay testimony. However, petitioners previously filed reports from their medical expert, Dr. Marcel Kinsbourne. Respondent has not filed an expert medical report.

FACTS

Daniel was born on March 7, 1988. Because of anxiety and panic attacks during her pregnancy with Daniel, Dr. Margolis[2] took Activan. Daniel received his first DPT vaccination on May 19, 1988, when he was two months old. Med. Recs. at 75.[3] He cried often during his second month of life.

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[2]Dr. Margolis, Daniel's mother, uses her professional name in her practice as a psychologist. Her husband, Dr. Northrup, is also a psychologist. Both referred to themselves as "Doctor," and the court will do so as well.

[3]The record in this case is comprised of all filings with the court including petitioners' medical records ("Med. Recs. at ___", petitioners' and respondent's exhibits ("P. Ex. ___ at ___," "R. Ex.___ at ___"), Dr. Gomez's testimony at Mayo Clinic (Gomez Tr. at ___"), and testimony taken at the hearing ("Tr. at ___").

Med. Rec. at 78. At four months of age, Daniel's head bobbed repeatedly. Med. Recs. at 78.

Daniel received his second DPT vaccination on July 15, 1988, when he was four months old. He received his third DPT vaccination on September 9, 1988, when he was six months old. Med. Recs. at 75. Daniel made screaming sounds during that evaluation. Med.. Recs. at 81.

According to the parents' joint affidavit, paragraph 4, Daniel suffered infantile spasms within two days of the third DPT vaccination. However, the medical records note a visit to the doctor's office three days after the third DPT vaccination, on September 12, 1988, for a flu-like syndrome. Med. Recs. at 78.

Daniel's next visit to the doctor was on September 20, 1988, eleven days after the third DPT vaccination. He had been waking at night, was irritable and coughing, and has nasal discharge. He returned to the doctor on September 26, 1988 with a decreased appetite, blisters in his mouth, and a low grade temperature. The doctor noted a lump where Daniel had received his DPT vaccination. Med. Recs. at 82. On September 27, 1988, a pediatric cardiologist, Dr. Deborah M. Friedman, evaluated Daniel for the presence of an asymptomatic heart murmur. In a letter to Dr. Herbert Lazarus, she wrote that Daniel's general health was excellent except for increased irritability within the past two weeks. Med. Recs. at 103.

Daniel next visited the doctor on October 3, 1988, again for a decreased appetite. He was lethargic, irritable, with a runny nose, a cough, and "apnea." Med. Recs. at 82. On October 4, 1988, Daniel had otitis media with irritability, fever, diminished appetite, abnormal repetitive movements, and feeding problems. Med. Recs. at 78.

On October 8, 1988, Daniel exhibited paroxysmal crying while throwing his head back. His crying was not accompanied by associated eye movements or tonic-clonic movements. The doctor's record indicates Daniel had been fussy and ingesting less liquids. Med Recs. at 83.

On October 10, 1988, Daniel saw Dr. Kaufman, who had been recommended by Dr. Levi. The doctor noted that three weeks earlier (approximately September 19, 1988, ten days after the third DPT

vaccination), Daniel began suffering seizure-like episodes lasting several minutes, during which he became upset. Dr. Margolis told Dr. Kaufman that Daniel had received a DPT vaccination ten days before the onset of his seizures.[4] Tr, at 86.

Dr. Kaufman recorded that Daniel had suffered three seizure-like episodes on October 9, 1988 and another episode on October 10, 1988, prior to the visit. The episodes had increased in frequency and intensity. Daniel's appetite was decreasing, but he continued to gain weight. Dr. Kaufman noted that Daniel had suffered no reaction to his DPT vaccinations except a lump on his leg. Dr. Kaufman diagnosed infantile spasms and probably TS. Med, Recs. at 86-87.

On October 10, 1988, Daniel was hospitalized at Lenox Hill Hospital for constant seizures. Med Recs. at 105. The history given was that seizure activity had started from ten days to two weeks earlier. Med. Recs. at 105. The history given to the pediatric attending doctor was that over the past three weeks, Daniel had had increasing irritability. About two days prior to admission, he had crying episodes associated with throwing his hands back and getting tense. This happened twice a day. The episodes increased markedly in frequency on the day before admission. Med. Recs. at 124.

The history given to Dr. Giddings on admission to Lenox Hill Hospital indicates that Daniel's seizure episode began two and a half weeks earlier (October 10, 1988).[5] The episodes consisted of sudden head dropping and extension and flexion of the arms, unaccompanied by loss of consciousness, incontinence, or rolling back of the tongue. Daniel had no history of seizures in the past. Med. Recs. at 110.

Daniel's parents consulted with a genetic counselor on October 27, 1988 and gave a history that, at two months, Daniel was irritable and cried

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[4]Daniel's medical history indicates that a vaccination was administered on September 12, 1988, which is incorrect. However, the time interlude of ten days between vaccination and onset of seizures is consistent with the history that the seizures began three weeks before Daniel saw Dr. Kaufman.

[5]A pediatric nursing admission assessment notes that Daniel slept except for seizures in the past month. Med. Recs. at 106

a lot. At four months, his parents noted head bobbing and abnormal movements. At six months, Daniel had a flu that aggravated his symptoms of irritability, poor feeding and abnormal movements. Med. Recs. at 169.

TESTIMONY

Dr. Manuel Gomez, the world's expert in TS, testified on October 21, 1991. Dr. Gomez's testimony on TS was taken at the Mayo Clinic and is described in Costa v. Secretary of HHS, No. 90-1476V, slip op. at 10-17 (C. Ct. Spec. Mstr. Feb. 26, 1992). (A description of Dr. Gomez's textbook and article on TS is on pp. 5-10 of the same opinion.)

Dr. Gomez testified that TS is not an encephalopathy. Gomez Tr. at 99. Rather, TS is a genetic disorder which is either inherited or results from a mutation. Gomez Tr. at 96. Brain growth controls tuber growth. The most common presenting symptom in TS is seizures. Gomez Tr. at 100. There is a demonstrable correlation between the presence of many low attenuated lesions and the frequency and severity of seizures and mental retardation in an infant less than one year old. Gomez Tr. at 101.

The most common age for onset of seizures in TS children is the first year of life. the most common symptom of presentation is infantile spasms. Infantile spasms are age-dependent seizures occurring between ages three and eight months, regardless of the cause. Gomez Tr. at 103.

Dr. Faye Margolis testified first. She is a clinical psychologist who, because she developed osteoporosis during her pregnancy, had to obtain child care for Daniel. Ms. Vida Grant provided this care between 8:00 a.m. Monday and 8:00 a.m. Saturday until June 1990. Tr. at 15-18, 26-27.

Dr. Margolis stated that Daniel cried following his first and second DPT vaccinations. He did not exhibit any signs of TS prior to his third DPT vaccination. On September 9, 1988, Ms. Grant, Daniel, and Dr. Margolis visited Dr. Kahn. Tr. at 24-26. When the nurse administered the vaccination to Daniel's thigh, blood trickled from the injection site. Immediately following the vaccination, Daniel screamed and cried. Throughout the weekend, he did not sleep well, continued to exhibit a high-pitched cry, became irritable and his appetite decreased. By Sunday, Dr. Margolis and her husband became alarmed but they did not relate their concerns to anyone. Tr. at 30-33.

On Sunday, September 11, 1988 at 11:00 or 11:30

a.m., Daniel was napping when Dr. Margolis witnesses his arms opening and his back arching. He did this repeatedly, even after Dr. Margolis touched him. Dr. Margolis stated that she did not tell the doctor about Daniel's actions during the weekend because she did not want the doctor to stereotype her as a worried mother. Daniel's infantile spasms became more intense over the following weeks. Tr. at 33-35.

On Monday, September 12, 1988, Ms. Grant noticed Daniel's crying, inability to eat, and apnea. She told Dr. Margolis that Daniel was arching his back and opening his arms repeatedly. Dr. Margolis thinks she called but did not take Daniel to the doctor's office that evening. Contrary to the medical records, Dr. Margolis testified that Daniel visited the doctor before the end of the week. Tr. at 36, 47-50.

On October 8, 1988, Dr. Margolis took Daniel to the doctor and showed him pictures of Daniel seizing; the doctor was not impressed. On October 10, 1988, Daniel visited Dr. Kaufman, a pediatric neurologist, who referred seizure activity while waiting at the nursing desk. Tr. at 65.

Daniel's seizures lasted nearly a year. They began as infantile spasms (8 or 9 up to 50) and developed into tonic-clonic seizures. Dr. Margolis first noticed Daniel's developmental delay a day or two after his third DPT vaccination when he stopped babbling. Today he is non-verbal. Tr. at 69-71.

Dr. Margolis and her husband compiled a feeding notebook, baby book and medical expense summary on Daniel's behalf. Dr. Margolis admitted that the medical expense summary does not reflect medical bills between September 9 and September 20, 1988. Tr. at 77.

Dr. Margolis noted the following in Daniel's baby book: first cold 9/88, ear infection and teething (miserable mouth); 9/9/88, shots, check-up; 9/27/88 - heat murmur - ok; 10/3/88 - ear infection, seizures? P. Ex. 5; Tr. at 112-13.

Daniel's feeding notebook reflects the amount of fluid Daniel drank every day:

9/9/88 - 33 ounces
9/10/88 - 28 1/2 ounces
9/11/88 - 31 ounces
9/12/88 - 18 ounces
9/13/88 - 24 1/2 ounces
9/14/88 - 31 ounces

P. Ex. 4; Tr. at 113-14.

Dr. Margolis stated that Daniel had a cold in the beginning of September 1988, but not at the time of his third DPT vaccination. The persistent cough reflected in the medical records occurred in early September. Daniel was teething but in good health at the time he received his third DPT. Tr. at 50-52, 56-57.

Dr. Margolis testified that she described Daniel's repeated arm openings to several doctors who indicated the movements were normal. She spoke to inaccurately when she told Dr, Kaufman on October 10. 1988 that Daniel's seizures had begun three weeks earlier; her sense of timing was unreliable. She told Dr. Kaufman that Daniel's only reaction to the DPT vaccination was a lump on his leg because she did not relate Daniel's problems to the vaccination. She does not recall giving histories as they appear in Dr. Kaufman's or Lenox Hill Hospital records. Tr. at 83, 87-89, 100, 109.

Dr. Margolis testified that she does not remember telling Dr. N. Kardin that Daniel was irritable. Daniel did not have prolonged periods of irritability, poor feeding, or abnormal movements. She interprets Dr. Kardin's notation to mean that Daniel's abnormal movements consisted of head bobbing at four months of age. Tr. at 117-19.

Dr. George Northrup testified next for Petitioners. He also is a clinical psychologist. Tr. at 122. He testified that he was under enormous strain when giving the history at Lenox Hill Hospital. He was not exact in determining for how long Daniel's episodes had been occurring. Initially, Dr. Northrup and his wife interpreted Daniel's symptoms of fever, loss of appetite and irritability as flu-like. Tr. at 124-26. Between September 9th and October 10th, 1988, Daniel's symptoms worsened; he spent a significant amount of time screaming. Tr. at 146.

Dr. Northrup testified that Daniel was not irritable, did not exhibit head movements and was happy and playful prior to his DPT vaccination. At approximately two months of age, Daniel did not sleep well for a brief period of time. Dr. Northrup first witnesses Daniel's head movements during the early part of summer 1988, not in August. Tr. at 143. Dr. Northrup first suspected DPT caused Daniel's seizures in 1990. Tr. at 127-28.

Although Dr. Northrup normally did not work on weekends, he has no recollection of Daniel's behavior on Sunday, September 11, 1988. Dr. Northrup had the flu in September 1988 and was not present with Daniel, Dr. Margolis, and Ms. Grant when they visited

the doctor. He may have been present on Saturday, October 8th. Dr. Northrup stated that he gave only one history at Lenox Hill Hospital. Tr. at 138-143.

Dr. Northrup and his wife tried to record events contemporaneously in Daniel's baby book. The notation in Daniel's baby book that indicates he had his first cold, an ear infection and was teething (and had a miserable month) was made at the end of September. Tr. at 148-50.

Vida Grant, Daniel's caretaker, testified next for petitioners[6] She has four children of her own. Ms. Grant stated that Daniel developed normally and was a happy baby between the ages of two and four months. Tr. at 159-60.

Ms. Grant always accompanied Daniel to the doctor. Daniel was not distressed prior to receiving his third DPT vaccination on Friday, September 9, 1988. Tr. at 159-61. Following the vaccination, however, he began screaming and crying. He cried throughout the day and night except during brief periods of sleep. Ms. Grant left the Northrups for her own home on Saturday at 8:00 a.m., and returned on Monday, September 12, 1988, at 8:00 a.m. to find Daniel crying. Ms. Grant witnessed Daniel crouching forward as if hugging. She related the incident to Dr. Margolis, who called the doctor that morning. tr. at 160-64.

Ms. Grant testified that Daniel, Dr. Margolis, and she visited the doctor on four straight Mondays, including September 12th and 19th.[7] Daniel's hugging episodes occurred several times daily during the following weeks. He bent forward with his arms in the shape of an "O;" Ms. Grant never saw Daniel arch his body and stretch out his arms. On October 10, 1988, Dr. Levy referred Daniel to Dr. Kaufman. Tr. at 165-68, 180.

Ms. Grant testified that Daniel exhibited head movements daily between April and September 1988. Daniel was not feverish following his third vaccination or at any other time in September 1988. His feeding decreased steadily for three or four months following his third DPT vaccination.

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[6] Ms. Grant was sequestered during the testimony of her former employers, Dr. Margolis and Dr. Northrup.

[7] The records do not reflect visits on September 12 or 19, 1988, but they do reflect one on September 20, 1988.

Daniel's seizures changed following his admission to Lenox Hill Hospital. He no longer crouched forward, but became rigid and fell down. His arm movements did not change character. Tr. at 170-74

DISCUSSION

This case hinges upon whether Daniel's seizures began within three days of his DPT vaccination. If so, pursuant to Suel v. Secretary, HHS, No. 90-935V (Fed. Cl. Dec. 21, 1993), the court must hold that DPT vaccine significantly aggravated Daniel's TS.

The court does not believe that Daniel's infantile spasms began within Table time of the DPT vaccination. Petitioners are by their own admission compulsive, yet in their baby book, they recorded nothing of what they testified occurred. Moreover, every history they gave to numerous medical personnel reflects an onset of seizures ten days after receipt of Daniel's third DPT vaccination.

Although Dr. Margolis does not remember giving these histories, she acknowledged that she must have given them at the time. She wants the court to find that the histories given five years ago in the context of treatment were inaccurate and the histories testified to at hearing in the context of litigation are accurate. Well-established case law holds that information in contemporary medical records is more believable than that produced years later at trial. United States v. United States Gypsum Co., 333 U.S. 364, 396 (1968); Montgomery Coca-Cola Bottling Co. v. United States, 615 F.2d 1318, 1328 (Cl. Ct. 1980).

Ms. Grant's testimony caps the unreliability of the parents' testimony. Dr. Margolis and Dr. Northrup testified that Daniel threw open his arms and arched his back on September 12, 1988, and that he ran a fever during the entire month of September. Ms. Grant, on the other hand, testified that Daniel hunched forward on September 12, 1988 as if he were hugging, and that he did no become feverish following his third DPT vaccination or at any other time in September 1988.[8]

Ms. Grant would be more believable than

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[8]The contemporaneous medical records reflect flu-like symptoms on September 12, 1988 but do not indicate that Daniel visited the doctor on that date. The next apparent doctor's visit following Daniel's September 9, 1988 vaccination was September 20, 1988.

Daniel's parents because of her lack of litigative interest except that she testified to doctor's visits on dates for which no medical record exits (September 12 and 19, 1988). There is enough discrepancy between her testimony and that of Daniel's parents regarding the presence or absence of fever, the form of seizure activity, and the visits to the doctor to cast doubt on all three fact witnesses' testimonies. Seeing no reference in the parents' baby book or the contemporaneous medical records to seizures beginning within Table time of the DPT, the court holds that Daniel's seizures began ten days following his third DPT vaccination i.e., off-table.

Petitioners have not satisfied their burden of proving that Daniel experienced an on-Table onset of a seizure. 42 U.S.C. § 300aa-11(c)(1)(C)(i) and 14(a).

The burden of proof did not shift to respondent since petitioners failed to prove an on-Table case. However, respondent's position that Daniel's condition is due to a factor unrelated, TS, is clearly substantiated in the records. 42 U.S.C. § 300aa-13(a)(1)(B).

CONCLUSION

The court sympathizes with parents who earnestly believe that DPT vaccine harmed their child. The evidence in this case, however, must override sympathy. Daniel was born with a terrible disease that predictably affected his mental capacity and upon which the DPT vaccine exerted no influence.

This petition is dismissed with prejudice. In the absence of a motion for review filed pursuant to RUSCC Appendix J, the clerk of the court is directed to enter judgment in accordance herewith.

IT IS SO ORDERED.

DATED: February 3, 1994 S/_____
Laura D. Millman
Special Master